



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Contact International Corporation

File: B-237122.2

Date: May 17, 1990

William E. Franczek, Esq., Vandeventer, Black, Meridith & Martin, for the protester.

Paul N. Frenkel, for Servrite International, Ltd., an interested party.

Colonel Herman A. Peguese, Office of the Assistant Secretary, Department of the Air Force, for the agency.

Scott H. Riback, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency engaged in discussions with offeror where correspondence between the parties resulted in significant revisions to firm's initially offered price. Fact that agency was motivated initially to correspond with firm because of suspected mistake was immaterial where ultimately the communications resulted in price revisions which were not based on errors in calculations, but rather an error in judgment.

2. Despite disclosure of competitors' prices, agency decision to hold discussions and request best and final offers to remedy improper discussions held after initial offers were submitted is not objectionable. Risk of possible auction is secondary to the need to preserve the integrity of the competitive procurement system, and agency has significantly changed requirements which lessens potential for auction.

DECISION

Contact International Corporation (CIC) protests as improper the Department of the Air Force's decision to amend request for proposals (RFP) No. F62562-89-R0130, and request best and final offers (BAFO).

We deny the protest.

048534 / 141397

This is our second decision concerning this RFP for the operation of a dairy plant and the production of specified milk products. In our first decision, Servrite Int'l, Ltd., B-237122, Jan. 4, 1990, 90-1 CPD ¶ 15, Servrite protested that the agency had erred in awarding a contract to CIC because it was not the low, responsible offeror based on initial offers. In response to that protest, the Air Force reported that subsequent to the receipt of initial offers (under which Servrite was the apparent low offeror), it had sought certain price "clarifications" from both firms in order to permit proper price evaluation.^{1/} The Air Force concluded that it had engaged in improper price discussions with Servrite prior to making its award to CIC. Because the contracting officer failed to request BAFOs, the Air Force was not certain that the award was made to the most advantageous proposal. Consequently, the Air Force proposed to amend the RFP in order to allow both firms to engage in formal discussions and to submit BAFOs. The Air Force, therefore, asked our Office to dismiss the initial protest as academic.

In response to the Air Force's proposed corrective action, Servrite objected to the Air Force's decision to hold discussions and to request BAFOs. Servrite argued that the proposed action created an impermissible auction since initial prices had been exposed. Servrite therefore argued that the Air Force should make award to it under the unrevised initial proposals.

In our initial decision, we did not resolve the question of whether or not the Air Force's communications constituted improper discussions. Rather, we stated that if the Air Force's communications constituted clarification, not discussions, then Servrite's offer as clarified was not low and award to CIC as the low-priced firm on initial offers was proper. Alternatively, we found that if the Air Force's actions constituted improper discussions solely with Servrite, Servrite had no basis to complain to the Air Force since the agency was required to permit CIC an opportunity to engage in discussions and submit a revised offer. Consequently, we concluded that the Air Force's proposed corrective action was the most appropriate course of action under the circumstances and denied Servrite's objection.

^{1/} In its initial reporting of these actions to our Office, the Air Force did not provide us with any detail regarding the precise nature of its actions. It was clear, however, that the "clarifications" resulted in the displacement of Servrite as the apparent low offeror.

CIC, the awardee, now protests the Air Force's proposed corrective action on two grounds. First, CIC argues that the Air Force's communications with Servrite prior to award did not constitute discussions but, rather, were clarifications of a mistake in the firm's offer. CIC argues that the Air Force only queried Servrite with respect to what the firm had proposed for price adjustments permitted during the course of contract performance, suspecting that Servrite had made a mistake in its offer. According to the protester, the adjustments made by Servrite in response to the agency's inquiry only amounted to an overall change in that firm's price of 3 percent and were therefore de minimis in their affect on price. The protester argues that all of the correspondence between Servrite and the Air Force was for the purpose of attempting to remedy a "clerical mistake" in Servrite's bid and was therefore a clarification within the meaning of Federal Acquisition Regulation (FAR) §§ 15.607 (FAC 84-16) and 14.405 (FAC 84-12).

Second, CIC argues that the reopening of discussions and request for BAFOs at this stage of the procurement is an inappropriate remedy. Because prices have been exposed, CIC asserts that the proposed corrective action will result in an impermissible auction in contravention of FAR § 15.610(d)(3) (FAC 84-16).

The Air Force responds that its communication with Servrite did in fact constitute discussions. The Air Force points out that its communication with Servrite resulted ultimately in an overall increase in the firm's price of \$35,269.90, which was sufficient to displace Servrite as the low offeror. Also in this respect, the Air Force points out that Servrite was afforded an opportunity to make changes in certain unit prices which did not relate to the apparent nature of the firm's initial "mistake."

Regarding the possibility of an auction, the Air Force reports that it is making significant changes to the RFP requirements. In particular, the agency reports that it now will require the contractor to furnish non-fat dry milk under the contract while previously this product was furnished by the government. Also, it is changing the milk ingredients to reduce saturated fat content. According to the Air Force, these changes will have a significant impact upon the offerors' prices.

Discussions occur when an offeror is given an opportunity to revise its initial offer or to provide information essential for determining the acceptability of its offer. FAR § 15.601 (FAC 84-28); Thermal Reduction Co., B-236724, Dec. 7, 1989, 89-2 CPD ¶ 527. When a mistake is suspected

or alleged before award in a negotiated procurement, the FAR contemplates that the mistake will be resolved through clarifications or discussions. See FAR § 15.607(b)(4). The correction of a suspected mistake without the agency conducting discussions is appropriate where the existence of the mistake and the proposal actually intended can be clearly and convincingly ascertained from the RFP and the proposal itself. See Stacor Corp., B-231095, July 5, 1988, 88-2 CPD ¶ 9 (agency properly permitted firm to supply price for line item without engaging in discussions where firm's proposal contained consistent pricing pattern which clearly established firm's intended price for omitted line item.)

Here, the agency clearly went beyond clarification to correct a suspected mistake which was ascertainable from Servrite's offer. The agency and Servrite engaged in a total of three written exchanges concerning the firm's unit prices for the various price adjustment formulas called for under the RFP. In the aggregate, these exchanges resulted in Servrite making a net upward adjustment in its overall proposed price of \$35,269.90, thereby rendering it the second-low offeror after it had initially been found to be the apparent low offeror. Clearly, the price revisions based on these changes were not de minimis. These increases resulted not only from a change in the quantities to which Servrite was applying the adjustment formula but also from changes in the rates which it offered for the various adjustment formulas which were not related to any mistake. Thus, the record shows that these changes made by Servrite to its offer during the course of its correspondence with the Air Force went beyond the mere clarification of an apparent mistake and were modifications to its proposed price based on its own business judgment as to the cost of the work performed. This view is reinforced by the fact that there is no indication from the record that Servrite's alleged mistake and intended offer could be clearly and convincingly established from the RFP and firm's initial offer. We therefore conclude that the Air Force improperly engaged in discussions exclusively with Servrite. Once an agency conducts discussions with one offeror, as here, it is required to hold discussions with, and request BAFOs from,

all offerors in the competitive range.^{2/} See Greenleaf Distribution Servs., Inc., B-221335, Apr. 30, 1986, 86-1 CPD ¶ 422.

As to CIC's second allegation--that the reopening of discussions and request for BAFOs in this case would allow an impermissible auction--it is our view in considering corrective action that generally the risk of an auction is secondary to the need to preserve the integrity of the competitive procurement system through appropriate corrective action. See, e.g., Cubic Corp.--Request for Recon., B-228026.2, Feb 22, 1988, 88-1 CPD ¶ 174. In this case, we think that the Air Force correctly concluded that it improperly conducted discussions with only one offeror and that the proposed corrective action is necessary in order to preserve the integrity of the competitive procurement system. Id. In addition, we think that the Air Force's changed requirements which the agency reports will require significant upward price revisions in offers will serve to lessen the affect of prior disclosure of prices in this case.^{3/} We therefore agree with the Air Force's proposed corrective action.

The protest is denied.



James F. Hinchman
General Counsel

^{2/} CIC also argues that since only Servrite benefited from the discussions, there is no need to reopen the competition to afford Servrite an opportunity to submit a BAFO since CIC, the firm which had not benefited from discussions, nevertheless received award of the contract. However, we merely note that the Air Force, in our view, reasonably found that Servrite may have been prejudiced by the improper discussions and that the Air Force may not have obtained the best price.

^{3/} CIC disputes this point, arguing that the cost of non-fat dry milk will be relatively constant for both firms. However, based on the record, we find that this change, the other change concerning fat content, and the length of time since the original offers, should reduce the potential of an auction.